

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
HARRISONBURG DIVISION**

<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>v.</b>	)	<b>Criminal Action No. 5:12cr011</b>
	)	
<b>VICTOR GONZALEZ-RODRIGUEZ,</b>	)	<b>By: Michael F. Urbanski</b>
<b>et al.,</b>	)	<b>United States District Judge</b>

**MEMORANDUM OPINION**

This case, a multi-defendant heroin trafficking and firearms prosecution, is before the court on the motion by one defendant, Victor Gonzalez-Rodriguez, for a continuance of the trial scheduled for February 25, 2013. (Dkt. # 311.) A hearing was held on this matter on January 30, 2013.

By way of background, the indictment in this case was handed down on March 15, 2012. Many of the defendants were arrested shortly thereafter, and a number of them have been detained since their initial appearances on March 22, 2012. Defendants have twice moved for continuance of the trial to allow for adequate preparation, without objection from the government. In addition to the number of defendants and counts charged, the case is complicated by the fact that it requires both Russian and Spanish translators.

In support of the motion for continuance, counsel for Gonzalez-Rodriguez stated that his client cannot be ready for trial on February 25, 2013 due to circumstances beyond his control. First, his client is in federal custody in the Eastern District of Pennsylvania pending transfer to this district. Transfer of Gonzalez-Rodriguez to this district has been delayed by a competency evaluation ordered by the Eastern District of Pennsylvania requiring defendant to be evaluated at the Federal Medical Center in Butner, North Carolina. Gonzalez-Rodriguez was only returned to the Eastern District of Pennsylvania from FMC Butner in the past few days, and a competency

hearing has been scheduled in Philadelphia for February 12, 2013. In a status update provided by the government on February 6, 2013, counsel indicated that it is expected that Gonzalez-Rodriguez will be ordered transported to the Western District of Virginia at that time. Given the fact that Gonzalez-Rodriguez has not yet had a competency hearing and has been at FMC Butner for the past several months, counsel for Gonzalez-Rodriguez indicates that he cannot proceed to trial on February 25, 2013 as he has not had sufficient time to meet with his client and prepare for trial. No party, including the government, has objected to a continuance as regards Gonzalez-Rodriguez, and the court agrees that the trial against him cannot proceed on February 25, 2013 as he simply cannot be prepared for trial by that time. As such, the court is required to grant the motion to continue as to Gonzalez-Rodriguez. A new trial date will be obtained following his arraignment in this district.

The next issue to be resolved concerns the scheduling of the trial against the other defendants. At the hearing on January 30, 2013, five of the remaining defendants, Denys Digalov, Alexander Kubskiy, Jesus Batista, Vladimir Mazur, and Alexander Ivashin, indicated that they expected to go to trial. Two of these defendants, Denys Digalov and Vladimir Mazur, did not object to a further continuance of the February 25, 2013 trial date. Three defendants, Alexander Ivashin, Alexander Kubskiy and Jesus Batista, objected to any further continuance and insisted on going to trial on February 25, 2013. Both Kubskiy and Batista have been detained since March 22, 2012.

The court inquired as to whether the case against Gonzalez-Rodriguez should be severed, leaving the remaining defendants to proceed to trial on February 25, 2013. The government vehemently objected to such a severance, indicating that Gonzalez-Rodriguez may be an important witness for the government and, as such, may need to be present. Given the fact that

Gonzalez-Rodriguez was not yet in this district, the government asked that the case be continued yet again. In addition to concerns over efficiency and prejudice to the government if Gonzalez-Rodriguez turns out to be a government witness and cannot be present, the government argued that there was no prejudice to defendants from an additional continuance. The government further argued that there was no Speedy Trial Act problem as the case fell within several exceptions occasioned by the delay resulting from Gonzalez-Rodriguez's competency evaluation and transfer from the Eastern District of Pennsylvania. See 18 U.S.C. § 3161(h)(1)(A) and (E).

The court cannot agree to any further delay in the trial of this case as to the defendants other than Gonzalez-Rodriguez. The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. Const. amend. VI. Although the government argues that the defendants cannot show prejudice from an additional continuance, the Supreme Court counseled in Doggett v. United States, 505 U.S. 647, 652 n.1 (1992), that a post-accusation delay approaching one year is presumptively prejudicial. In United States v. Woolfolk, 399 F.3d 590, 598 (4th Cir. 2005), the Fourth Circuit saw “no reason to deviate from th[e] general rule” that delay of eight months or longer was presumptively prejudicial, triggering the speedy trial enquiry set forth in Barker v. Wingo, 407 U.S. 514, 530 (1972) (“Length of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.”). Although defendants previously sought two continuances of this matter, three of them facing trial have now asserted their speedy trial rights. Defendants were indicted nearly eleven months ago and two have been detained pretrial since March 22, 2012.

The Supreme Court has recognized that when defendants are properly joined for trial, “a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from

making a reliable judgment about guilt or innocence.” Zafiro v. United States, 506 U.S. 534, 539 (1993). It is well-established in the Fourth Circuit that “[g]enerally, individuals indicted together should be tried together,’ and ‘a defendant is not entitled to severance merely because separate trials would more likely result in acquittal, or because evidence against one defendant is not as strong as that against the other.’” United States v. Khan, 461 F.3d 477, 490-91 (4th Cir. 2006) (quoting United States v. Strickland, 245 F.3d 368, 384 (4th Cir. 2001)). Joinder is highly favored in conspiracy cases. United States v. Chorman, 910 F.2d 102, 114 (4th Cir. 1990).

The party seeking severance under Rule 14 “bears the burden of demonstrating ‘a strong showing of prejudice. . . .’” United States v. Branch, 537 F.3d 328, 341 (4th Cir. 2008) (quoting United States v. Goldman, 750 F.2d 1221, 1225 (4th Cir. 1984)). Such burden requires a moving defendant to show that a joint trial will result in “actual prejudice” to such defendant. United States v. Reavis, 48 F.3d 763, 767 (4th Cir. 1995).

Although an additional delay as regards the trial of Gonzalez-Rodriguez is necessary due to his intervening competency evaluation and his continued presence outside this district, the case against him may be severed and proceed as scheduled as to the other defendants. Although a severance may be less efficient, any efficiency concerns pale in comparison to defendants’ Sixth Amendment right to a speedy trial. Given the circumstances of this case, therefore, the court finds that continuing the case once again to allow a joint trial will compromise the speedy trial rights of the three defendants who have invoked their right to a speedy trial. Given that all three of these defendants were indicted eleven months ago and two have been detained since March 22, 2012, the court finds that these defendants will be prejudiced by further delay. The fact that Gonzalez-Rodriguez may turn out to be a witness for the government does not change the constitutional calculus. Indeed, the government indicated in a status report to the court

yesterday that it remains uncertain as to whether Gonzalez-Rodriguez “will proceed to trial or agree to be a cooperating witness.” Defendants, indicted eleven months ago, are entitled to their day in court as scheduled.

An appropriate Order will be entered.

Entered: February 7, 2013

*/s/ Michael F. Urbanski*

Michael F. Urbanski  
United States District Judge